IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR

MONDAY, THE 12TH FEBRUARY 2007 / 23RD MAGHA 1928

CRL.A.No. 2190 of 2004(C)
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SC.121/2001 of ADDL. SESSIONS COURT (ADHOC), THRISSUR
CP.20/2000 of JUDL. MAGISTRTE OF FIRST CLASS COURT-III, THRISSUR
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APPELLANT: APELLANTS
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1. MURALI @ KUTTAI,
CONVICT NO. 955,
CENTRAL PRISON,KANNUR.

2. JYOTHISH,
CONVICT NO.956,
CENTRAL PRISON,
KANNUR.

BY ADV. SRI.K.K.RAJEEV,STATE BRIEF.
& SHRI P. VIJAYABHANU

RESPONDENTS: RESPONDENT
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STATE OF KERALA.

BY PUBLIC PROSECUTOR SHRI K.C. SANTHOSHKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 12/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**J.B. Koshy & T.R. Ramachandran Nair, JJ.**

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p.m. on the same day before P.W.12, the Sub Inspector of Police who registered Crime No.116/1999 under Section 302 read with Section 34 I.P.C.

4. The prosecution examined P.Ws.1 to 12, Exts.P1 to P20 and MOs.1 to 21 are the other evidence produced by the prosecution. The appellants pleaded not guilty to the charges. The learned Sessions Judge found them guilty and convicted and sentenced them as stated above.

5. We heard Shri P. Vijayabhanu, and Shri K.K. Rajiv, learned counsel for the appellants and the learned Public Prosecutor for the State.

6. The main arguments advanced by the appellants are that the eye witnesses, P.Ws.1 and 2 could not have seen the incident or identified the assailants in the absence of sufficient light at the scene of occurrence. The argument strenuously placed is that there was no sufficient light either from any nearby houses or from the streetlight as the nearest street light is situated 26 meters away from the scene of occurrence. Hence, the counsel argued that PWs. 1 and 2 cannot be believed when they testify that they saw the accused inflicting fatal injuries on the deceased. The other argument is based on the plea that the motive that is alleged is too weak and the prosecution has not successfully established any motive so as to connect the accused with the crime. It was also argued that the injuries inflicted on the

neck, etc. could not have been caused by the weapon used, (MO.1) and further, that there is no evidence medical evidence to the effect that the cut injuries could have been caused by MO.1 chopper.

7. In the light of the above contentions, the evidence tendered by PWs.1 and 2 has to be discussed in detail. P.W.1 in his deposition before the Court, stated that the deceased being a neighbour, was known to him as well as the accused who are also his neighbours. They are known to him even from his childhood. The residential house of the deceased is on the western side of his house whereas the first accused is residing on the southern side of the scene of occurrence and the second accused is residing only 10 to 20 meters north of the scene of occurrence. The occurrence was before the house of one Balakrishnan in the road. The house of the deceased is on the northern side of the residential house of Balan Nair. He further deposed that after taking his meals in the night, he was coming out of his house and had almost reached the road. Then he found the deceased coming in a motor bike through the road from west to east. He found the deceased talking to the second accused who was having a chopper with him at that time. He heard the deceased telling the second accused that between them, there are no disputes. Thereafter, he saw the first accused taking an iron rod from the "chal" (water way) on the southern side of the road,

asking him to keep away. Thereafter, he inflicted a blow with the iron rod on the head of the deceased, causing him to fell down from the motor bike. Immediately, he saw the second accused inflicting cut injuries on his neck and seeing this, he cried. Immediately he went to the house of one Pradeep (only two houses away) and told the matter to one Sarasu, mother of Pradeep. Thereafter, he went to the house of the deceased and told his brother Suresh about the incident. Seeing this, he rushed to the house of P.W.3 and sought for a torch and this house happens to be on the immediate north of the scene of occurrence. He told P.W.3 that accused 1 and 2 caused injuries to the deceased with an iron rod and a chopper and he came back with a torch. By that time, Suresh and other neighbours had assembled there and a car was brought by his brother. The deceased was taken to Aswini Hospital by his brother, P.Ws.1 and 2 and other people. By that time the deceased had succumbed to the injuries and therefore he was taken to the Medical College Hospital, Thrissur.

8. The evidence of P.W.1 will show that the same is clear in material particulars, and he speaks clearly about the overt acts of accused 1 and 2. He gave the F.I. Statement, Ext.P1. It is important to note that P.W.1 knows the deceased as well as the accused. In fact, he had seen the deceased talking to the second accused before the occurrence. At that time,

the second accused was having a chopper with him. When the first accused inflicted the injury on the head of the deceased, he fell down and thereafter the second accused inflicted cut injuries on the neck. It is important to notice in this connection that the accused as well as the deceased are intimately known to P.W.1 and they are his neighbours. In the cross examination, he stated that there was sufficient light from the the tube light in front of the house of Balan Nair and from the street light. Therefore, the argument that P.W.1 could not have witnessed the incident clearly falls to ground. In fact, he has deposed in his cross examination that the deceased and the accused were only 5 to 6 meters away from the spot where he was standing and that his house is only 5 to 8 meters from the road. It is also clear from the evidence that the residential house of Balakrishnan is only two meters away from the scene of occurrence. These facts will clearly establish that there is no improbability either in regard to the presence of P.W.1 at the scene or in regard to the fact that he was an eye witness to the entire occurrence.

9. Ext.P6 is the scene mahazar. The place of occurrence is in the road named Madakkathara - Thrissur K.N.R. Road. The road is lying east-west. From the point called St. Joseph's Church junction about 150 meters away, the house of one Balan Nair is situated on the northern side of the

road. The house is facing east.

10. P.W.2 has been examined by the prosecution as an independent eye witness. Going by the evidence of P.W.2, his house is just on the north of the scene of occurrence and he saw the incident also. According to him, while he was sitting on the verandah, he heard a cry from the road, namely, KWR road. He came out of his house running and found the deceased lying down. He saw the second accused brandishing MO.2 chopper against the neck of the deceased and found the first accused with an iron rod aimed against the deceased. Both accused are his neighbours and friends and they are known to him even from early periods. According to him, he saw the incident while the street light was on and there was light from his house also. He has also spoken about some relatives of the deceased and others immediately arriving at the spot and removing the deceased to the hospital. He accompanied them in a bike. He has specifically stated about the overt acts attributed to the second accused and identified the weapons MO.1 and MO.2 used by the accused. He is also a witness to the seizure mahazar of MO.1 chopper from the second accused. In the cross examination, no material contradictions have been brought out and the major part of the cross examination concerns the seizure of MO.1. We find that the evidence of PW.1 is corroborated by the evidence of

P.W.2 and being eye witnesses, they have clearly deposed about the overt acts attributed to both the accused. Their evidence could not be shaken in the cross examination. Both P.Ws.1 and 2 are residents very near to the houses of the deceased and the accused and the accused as well as the deceased are known to them intimately also. Hence, the argument of the appellants that there was no possibility of P.Ws.1 and 2 witnessing the incident is unacceptable in the light of the clear evidence regarding the electric light very near to the scene of occurrence and light spreading from the nearby houses.

11. P.Ws.1 and 2 have given credible, consistent and convincing evidence about the entire episode. We find that their evidence appears to be natural and true and hence the same is reliable. Apart from the fact that both of them have spoken to the details of what they saw, the fact that the accused and the deceased were closely known to them is also significant as regards the question of identification of the assailants are concerned. Counsel for the appellants argued that there was no sufficient light at the time when the murder was convicted. It is clear from the evidence of P.W.1 that there was light from the electric post as well as from the tube light from the house of Balan Nair. In view of this evidence, it is evident that the plea that there was no sufficient light for them to witness the incident, is not

correct. Further, P.W.1 has spoken in detail the sequence of events. The story that is unfolded will show that he had seen the deceased coming in the motor bike and talking to the second accused which was the starting point of the entire incident. He had also seen the accused inflicting the fatal injuries on the deceased. The reaction on the part of P.W.1 in immediately alerting the neighbours including the brother of the victim is only a natural one. These circumstances clearly are against the arguments advanced by the appellants. Further, in the light of the principles stated by the Supreme Court in **Augustine Saldanha v. State of Karnataka** (AIR 2003 SC 3843) and **State of U.P. v. Babu and others** (AIR 2003 SC 3408) also the arguments cannot be countenanced. While answering a similar contention that identification of the accused was not possible because of want of sufficient light, the Honourable Supreme Court emphasised the fact that when the assailants are known to each of the witnesses, there is nothing wrong in the eye witnesses identifying the accused persons. Paragraph 21 of the decisoin reported in AIR 2003 SC 3843 is extracted below:

> "21. Undisputedly the incident took place in a dark night when visibility was poor but identification was possible because the victims of the assailants were known to each other. Therefore,

> there is nothing wrong in P.W.1 identifying the accused persons. the fact remains that in the dark night obviously one cannot move without a torch or some other lighted object. In fact, in Ext.P1 also there is mention of a torch."

Similarly, in AIR 2003 SC 3408, in rejecting a similar argument, the Honourable Supreme Court held as follows:

> "7. Apart from the mention about the torchlight, one important aspect which cannot be lost sight of and which is of relevance and great significance is that the accused persons are known to the witnesses. When the persons are known, identification is possible from the manner of speech, manner of walking and gesticulating and special features of a person like the physical attributes."

In view of the above principles, the learned Sessions Judge was right in concluding that the argument that P.Ws.1 and 2 could not have identified the assailants is unacceptable.

12. P.W.3 has spoken about the fact that P.W.1 came to her house and told her that appellants had attacked the deceased and that he further requested for a torch. She willingly gave an emergency lamp to P.W.1. Obviously this was just before taking the deceased to the hospital, and for want of use at night. This part of the evidence of P.W.3 has been accepted

as res gestae by the learned Sessions Judge. The deposition of P.W.1 would show that he has clearly narrated the incident from the start as well as the acts of the accused/appellants causing the fatal injuries to the deceased. It is evident that the reaction of P.W.1 in disclosing the details immediately to P.W.3 and others is only natural and the request for a torch made by him to P.W.3 cannot also be disbelieved in view of the suddenness of the action and the immediate removal of the victim to the hospital. The prosecution relied upon the evidence of P.W.3 in the light of the fact that the same is admissible as res-gestae. We find that the statement of P.W.1 to P.W.3 has been made contemporaneous with the acts which constituted the offence and there was no time for reflection or manipulation. But it is important to notice that the conduct of P.W.1 was quite natural in that he was attempting obviously to save the deceased by alerting his close relatives and neighbours. It is therefore clear that the learned Sessions Judge was right in accepting the evidence of P.W.3.

13. The learned Sessions Judge had also met an argument raised by the accused based on Ext.P10 postmortem certificate, that the injuries mentioned by P.Ws.1 and 2 will not tally with the injuries sustained by the deceased. The evidence of P.Ws.1 and 2 will show that immediately after P.W.1 saw the second accused attacking the deceased with a chopper, he

went to the houses of his relatives and neighbours for immediately help. Similarly, P.W.2 reached the scene after he heard the cry of the victim and saw the deceased lying on the ground and simultaneous attack being made by second accused with MO.1. He had seen the first accused with MO.2 standing nearby aiming it against the deceased. In view of these aspects, it is evident that the contradictions attributed between ocular and medical evidence is not correct. In this regard, the learned Sessions Judge relied upon the dictum laid down by the Supreme Court in **Taman Kumar v. State of Union Territory of Chandigarh (**2003 (2) KLT Case No.94, page 72) to conclude that P.Ws.1 and 2 are reliable and their evidence can be accepted. We find no reason to reject the said finding in view of the circumstances and the evidence available in the case.

14.The case of the prosecution is supported by the recovery of weapons based on Ext.P13 disclosure statement of second accused as per Ext.P2 seizure mahazar. The recovery of MO.1 from the second accused is supported by the evidence of P.W.2 and P.W.11. MO.2 was seized as per Ext.P12 disclosure statement of first accused and as per Ext.P7 seizure mahazar. There is evidence of P.Ws.8 and 11 also. There has not been any arguments pointing out the insufficiency of the disclosures leading to the

recovery of MOs.1 and 2.

15. Counsel for the appellants argued that no clear motive could be proved by the prosecution, which factor is fatal to the prosecution case. We find that the argument cannot be accepted for more than one reason. Prosecution tried to prove motive by examining P.Ws.4 and 5, but they declared hostile as they only deposed that they saw deceased quarreling with two persons at Kallada Bar and Mayura Bar and they did not identify the two persons as accused. This is a case where there are clear evidence of eye witnesses whose evidence could not be shaken in any manner. Their evidence is natural, credible and convincing. In the above circumstances, since there is direct evidence regarding the manner in which the incident occurred and about the infliction of fatal injuries on the deceased, the proof of motive is not necessary. The evidence of independent witnesses is supported by the medical evidence also. Hence, the learned Sessions Judge was right in rejecting the said argument based on the principles stated in the decisions of the Supreme Court in **Bhagirath and others v. State of Haryana** (AIR 1996 SC 3431), **Muralilal Jivaram Sharma and others v. State of Maharashtra** (AIR 1997 SC 1593), **Baitullah and others v. State of U.P.** (AIR 1997 SC 3946), **Mani Kumar Thapa v. State of Sikkim**

(AIR 2002 SC 2920) and **Samp Singh v. State of Punjab** (2005 AIR SCW 5057 at para 55).

16. This is a case where, going by the postmortem certificate, 15 ante-mortem injuries have been described. They are as follows:

> 1. Incised looking lacerated wound 7 x 1cm x bone deep almost vertical over the top of head, its front end in the midline and 12 cm above the root of nose and its back end 15.5 cm above the root of left ear. Beneath injury number (1), the frontal bone showed a fissured fracture, for a length of 8 cm. The brain showed thick film of subdural and sub-arachnoid bleeding.
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> 2. Incised looking lacerated wound 4 x 1 muscle deep oblique over the right side of head and just above the parietal eminence and its front end 10 cm above the right ear.
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> 3. Incised looking lacerated wound 7 x 1.4 cm horizontal over the top of back of head, its right and left ends 14 cm and 10 cm above the ears respectively.
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> 4. Incised wound 3.5 x 2.5 cm horizontal involving both ala and bridge of nose.
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> 5. Superficial incised wound 2.6 x 1.5 cm horizontal the right side of upper lip its inner end at
>
> 6. Contusion 3.4 x 2.5 x 0.5 cm involving the mucosal aspect of upper lip across the midline with fracture of dislocation of both central incisors with infiltration of its edges and the gum margins filled with clotted blood.
> 7. Incised wound 1 x 1.4 cm horizontal over the front of chin; its right end 3.5 cm outer to 1.7 cm below the right angle of mouth and its left end 2 cm below the left angle of mouth in the 4 O' clock position. The jaw bone was cut through and through over an area 3 x 2.8 cm along with separation central and lateral incisors and canines attached to the distal segment. the muscles, nerves and

vessels were cut and separated.

8. Incised wound 17 x 1.7 x 9.5 cm horizontal over the front and sides of neck; its right and left ends 5.5 cm and 5 cm inner to both ear lobules in the 4 O' clock position. the strap muscles of the neck in between the hyoid bone and root of tongue was completely cut and separated exposing the cervical vertebra. Both the internal and external jugular were cut and separated. Carotid arteries devoid of any injury. Superficial nerves were also cut.

9. Incised wound 8.5 x 1.5 x 0.5 cm horizontal over the front and sides of neck 2 cm below injury number (8).

10. Incised wound 6.5 x 2.5 x 2 cm horizontal over the front of neck 0.7 cm below injury number (9).

11. Abraded contusion 3 x 05 cm x muscle deep horizontal over the front of neck crossing the midline and 6.5 cm above the root of neck. Bruising of both lobes of thyroid gland with infiltration into the strap muscles. Inward compression fracture of horns of hyoid bone.

12. Contusion 4.5 x 4 x bone deep over the top of shoulder.

13. Superficial incised wound 4.5 x 0.4 cm horizontal over the front of shoulder 2.2 cm below injury number (12).

14. Three incised looking lacerated wounds 2.5 x 2 cm x bone deep (horizontal) 3 x 1.5 cm x bone deep (oblique); 2.5 x 1.9 cm (oblique) over the front of left leg placed one below the other and separated by a distance of 1 cm and 0.8 cm and the third injury being 9.5 cm above ankle. Underneath the tibia was fractured into two pieces with infiltration into the soft tissues. The muscles, vessels, nerves were found lacerated.

15. Three incised looking lacerated wound 2.2 x 2 cm (superficial); 2.2 x 2 cm (bone deep) 2 x 1.8 cm (bone deep) placed one below the other and separated by a distance of 1.5 cm and 3.5 cm over the middle of right leg; the last injury mentioned being 20 cm above

heel."

As already pointed out, the evidence of P.Ws.1 and 2 have not been shaken by any material contradictions. When the doctor was examined as P.W.10, it is clearly stated that the deceased died of multiple injuries (injury Nos.1 to 3, 7, 8, 11 and 14). He has also deposed that injury Nos.1 to 3, 6, 12, 14 and 15 could be caused by beating with MO.2. He was specifically asked whether injury Nos.1 to 3, 6, 12, 14 and 15 could be caused by beating with MO.2. The answer is "possible". Similarly, to the question whether injury Nos.1 to 5, 7, 8, 9, 10 and 13 could be caused by MO.1, the answer is "possible". He has also further deposed that injury Nos.1 to 3, 7, 8, 11 and 14 were sufficient to cause death in the ordinary course of nature. Hence, the evidence of P.Ws.1 and 2 is clearly corroborated by the medical evidence. Even though the counsel for the appellants argued that these injuries could not have been caused by the weapon used, MO.2, there is no challenge in the cross examination of P.W.1 about any of those aspects and not even a suggestion has been made regarding the above aspect. Further, as the medical evidence is very clear on this aspect, we find that the argument raised by the counsel for the appellants on this point is liable to be rejected.

17. This is a case where the F.I. Statement was given by P.W.1 at 11.30 p.m., within two hours of the incident, wherein the names of accused 1 and 2 have been mentioned. There is no delay in recording the F.I. Statement, Ext.P1 and sending the F.I.R. to the Court which reached there at 10.30 a.m. on 20.4.1999. The accused were arrested on the next day and recoveries were also effected without any delay.

18. The evidence discussed above and proved by the prosecution will show that accused 1 and 2 had in furtherance of their common intention to cause the death of the deceased Sunil. The suggestions made are only to the effect that the deceased was a money lender who could not have been tolerated by anybody, but that is not a justification to cause his death. The evidence of P.Ws. 1 and 2 belies any argument that somebody else might have caused the injuries on the deceased.

In the above circumstances, we dismiss the appeal confirming the conviction and sentence passed by the learned Sessions Judge.

**(J.B. Koshy, Judge.)**

**(T.R. Ramachandran Nair, Judge.)**

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**J.B. Koshy & T.R. Ramachandran Nair, JJ.**

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